

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Zaclon, Incorporated,)
Zaclon LLC, and) Docket No. RCRA-05-2004-0019
Independence Land Development Company,)
)
Respondents.)

ORDER ON MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE

I. Background

The Complaint in this matter, as amended, charges Respondents (also referenced herein as “Zaclon”) with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.* by storing hazardous wastes, namely sash, baghouse dust and stripping acid, without a permit or interim status, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the state regulations implementing this provision, Ohio Administrative Code 3745-50-45. The original Complaint alleged one count of violation with regard to sash and baghouse dust. The Second Amended Complaint, alleging a second count of violation, with regard to stripping acid, was filed on October 14, 2005 (hereinafter referred to as “Complaint”). Respondents denied the alleged violations.

Complainant, U.S. EPA Region 5, filed a Motion for Accelerated Decision on Liability as to Count 1, which was granted on November 3, 2005. On January 9, 2006, Respondents filed a supplement to their Prehearing Exchange for Count 2 of the Complaint, and Complainant filed a Rebuttal Prehearing Exchange as to Count 2 on January 20, 2006. On February 3, 2006, the parties filed Cross Motions for Accelerated Decision as to Count 2, upon which an Order was issued on May 18, 2006, denying accelerated decision as to liability, but granting accelerated decision in part, on the issue of whether the stripping acid is a “spent material” within the meaning of the applicable regulations. The evidentiary hearing in this matter is scheduled to commence on June 6, 2006.

On May 22, 2006, Complainant filed a Motion for Leave to File a Final Supplement to the Prehearing Exchange (EPA’s Motion), seeking to add as proposed witnesses Mr. Mark Ewen and Mr. Barrett Benson, and to add Exhibits 37A through 57 to its Prehearing Exchange. On the same date, Respondents submitted a Motion to Supplement Prehearing Exchange (Respondents’ Motion), seeking to add one witness, Mr. Robert Woods, to their list of proposed witnesses. On May 25, 2006, Respondents submitted an Opposition to EPA’s Motion. On June 1, Complainant filed a Reply to the Opposition.

The Respondents' Motion was submitted to the Regional Hearing Clerk, opposing counsel and the undersigned by facsimile and Federal Express on May 22, 2006, which is fifteen days prior to the date the hearing is scheduled to commence. Also on that date, EPA's Motion along with the proposed Exhibits, were filed with the Regional Hearing Clerk, and sent by Federal Express to opposing counsel and the undersigned. While Respondents received EPA's Motion on May 22nd, they assert that the proposed Exhibits did not reach their counsel's office until the next day, May 23rd.

The Consolidated Rules of Practice provide, at 40 C.F.R. § 22.19(a):

Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.

Section 22.22(a) provides, in pertinent part:

If . . . a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

II. Respondents' Motion

Respondents provided the witness name and description of his expected testimony fifteen days prior to the commencement of the hearing, and therefore his testimony would not be rejected under the criteria of 40 C.F.R. § 22.22(a). Complainant did not file any opposition to Respondents' Motion.

The general issue on a motion to supplement a prehearing exchange is whether the opposing party would suffer any undue prejudice from including the supplement, such as inadequate opportunity to prepare cross examination and any rebuttal testimony and evidence in time for the hearing.

The testimony of Mr. Woods, an employee of Zaclon, as to the process involving the use of stripping acid to manufacture zinc ammonium chloride, pertains to the core issue of liability in this proceeding, as to which other witnesses will also testify. Therefore, it would not present any surprise to Complainant or require preparation of cross examination on any additional or unanticipated subject. Accordingly, the Respondents' Motion is **granted**.

III. Complainant's Motion

A. Arguments of the Parties

EPA's Motion states that its proposed Prehearing Exchange Exhibits 37-57 are all documents either authored by Zaclon employees, in Zaclon's possession already, or concern matters of which Zaclon is already cognizant, and therefore cannot prejudice Respondents. Complainant asserts that it may call a new proposed expert witnesses, Barrett Benson, as a rebuttal witness.¹ Mr. Benson would testify as an expert in hazardous waste determinations, waste characterizations, and reclamation processes, and may testify as to experiences in inspecting reclamation facilities, and his review of information regarding Zaclon's processes.²

In its Opposition, Respondents point out that the Complainant's proposed Exhibits are voluminous, approximately three inches thick, and were sent under separate cover from the Motion, arriving in Respondents' office on May 23, only fourteen days prior to commencement of the hearing. Respondents assert that they have not seen many of the exhibits or have not reviewed them for many years, and the time required for reviewing such a massive number of them, determining their relevance and preparing a response at the hearing is prejudicial to Respondents. Respondents point out that Complainant offered no explanation for producing such a large number of exhibits at the last moment, and for failing to produce them previously. Respondents argue that some exhibits are irrelevant, such as communications between EPA and galvanizers, which pertain to issues already decided in this proceeding, and spills of materials not at issue in this case, not RCRA wastes, and some of which are a decade old.

¹ Complainant also proposed another new expert witness, Mark Ewen, who would testify as an expert in forensic analysis of financial information and ability to pay the penalty. However, because an accelerated decision has been granted in favor of Complainant on the issue of ability to pay, Complainant stated in the prehearing conference that it will not be presenting Mr. Ewen as a witness.

² Complainant also proposed that he testify as to the issue of the stripping acid being a "spent material." The Order on motions for accelerated decision as to Count 2 ruled that the stripping acid is a spent material, and therefore his testimony on that issue is no longer relevant.

Complainant in its Reply argues that most of the documents were only recently made available to Complainant, and that the bulk of the pages of documents are in Complainant's proposed Prehearing Exchange Exhibits ("C's Exs.") 46 and 48. Complainant asserts that the nature and characteristics of chemicals are relevant to potential hazards and risks associated with Zaclon's operations, and references C's Exs. 50 and 51. Complainant asserts as to C's Ex. 52 that the zinc and iron chemistry and Dr. Kendall's expertise on this subject are crucial to the issues of liability on Count 2. The documentation of incidents at Respondents' facility are "clearly relevant" to the issue of the penalty, for an evaluation of the hazards, risks and potential for harm in the context of the factors and conditions at the facility, according to Complainant, and the aerial photograph, C's Ex. 47, will aid witnesses in demonstrating facts regarding hazards, risks and potential for harm.

B. Expert Witness

Complainant's Motion, proposing to include Mr. Benson as a rebuttal witness in its Prehearing Exchange, was filed fifteen days before the commencement of the hearing. In its Opposition, Respondents did not specifically oppose the testimony of Mr. Benson. Nevertheless, it must be determined whether Respondents would suffer any undue prejudice, such as inadequate opportunity to prepare cross examination and any rebuttal testimony and evidence in time for the hearing.

The proposed rebuttal testimony of Mr. Benson as to hazardous waste determinations, waste characterizations, reclamation processes, reclamation facilities, and his review of information regarding Zaclon's processes, pertain to the core issue of liability in this proceeding, as to which other witnesses will also testify. Therefore, it would not present any surprise to Respondents or require preparation of cross examination on any additional or unanticipated subject. Accordingly, the request in Complainant's Motion to add Barrett Benson as an expert witness is granted.

C. Discussion and Conclusions as to Proposed Exhibits

Complainant *filed* the Exhibits with the Regional Hearing Clerk fifteen days before the hearing, and sent the Motion and *list* of proposed Exhibits by facsimile to the Respondents, but did not *provide* the Exhibits to the Respondents, as required by 40 C.F.R. § 22.22(a), until fourteen days before the hearing. Therefore, the criteria of 40 C.F.R. § 22.22(a) apply, that is, the exhibit may not be admitted into evidence unless there was good cause for Complainant's failure to exchange the required information (proposed exhibits) sooner and Complainant provided the required information to all other parties as soon as it had control of the information, or there was good cause for not doing so.

Complainant's proposed Exhibits 37A and 37B are, respectively, an Information Request letter from EPA, dated February 21, 2006, and Respondents' Response thereto dated March 10,

2006, pertaining to difficulties with their stripping acid process, fees charged to and rebates offered to suppliers for stripping acid, and any hazardous material spills since 1986. While they were created relatively recently, Complainants did not explain why these documents were not submitted two months ago to supplement the Prehearing Exchange. On the other hand, Zaclon's own information about the stripping acid process presented in its March 10 Response would not be prejudicial and may be important for deciding core issues in this case. Therefore, prohibiting Complainant from offering these documents into evidence at this point on procedural grounds is, on balance, unwarranted.

Complainant's proposed Exhibits 38A is an Information Request letter from EPA dated May 1, 2006, and proposed Exhibits 38B and 38C are responses thereto from two of Respondents' stripping acid suppliers, dated May 9 and May 10, respectively. It is a bit troubling that Complainants sought information to support their case so close in time to the hearing, but without further information as to the context and delay, these documents will not be rejected at this point in the proceeding on that basis. Furthermore, information as to the content of, analysis, generation, and handling of the stripping acid is included in these documents, which is valuable and relevant to issues of liability on Count 2.

Complainant's proposed Exhibit 39 is a letter from Ohio EPA dated March 17, 2006, following up on Ohio EPA's Notice of Violation (NOV) dated November 14, 2005. Complainant's proposed Exhibit 40 includes Respondents' April 28 Response to the March 17th letter, both of which address Respondents' compliance with hazardous waste violations, including tracking and runoff from the sash pad, noted by Ohio EPA at Zaclon's facility. These documents address hazardous waste issues at the facility, which may be relevant to the penalty. Also included in C's Ex. 40 are field notes taken by Mr. Thomas Roth in January 1994, apparently sent by Ohio EPA by facsimile on May 5, 2006, which may be relevant to his December 23, 1994 letter stating that the stripping acid is not a solid waste. Complainant's proposed Exhibits 40A through 40L are attachments to the April 28, 2006 letter sent from Zaclon to Ohio EPA. As Exhibits 40 and 40A through 40L were apparently sent to EPA on May 5, 2006, most of them were sent by Respondents, and they stem from Exhibit 39, Exhibits 39 through 40L will not be precluded from being offered into evidence under the criteria of 40 C.F.R. § 22.22(a).

Complainant's proposed Exhibit 41 is Respondents' December 16, 2005 Response to Ohio EPA's NOV, and Exhibit 42 is field notes taken during the Ohio EPA inspection on August 10-12, 2005. There is no explanation as to why these documents were not submitted with EPA's Prehearing Exchange as to Count 2. Complainant has not shown that it had good cause for failing to exchange the information beforehand and that it provided the information to Respondents as soon as it had control of the information, and Complainant has not shown good cause for not doing so.

Complainant's proposed Exhibits 43, 44, 44A, 44B, and 45 are documents pertaining to a spill of wastewater in 1995 due to pump failure; fifty deteriorated drums, discovered by the U.S. Coast Guard in 1997, labeled as alkalis, corrosives and poisons; and a 25 gallon spill of

hydrochloric acid from overfill of an above-ground storage tank in June 2001. Complainant provides no explanation for submitting these documents only a few days before the hearing, and they could have been submitted as early as Complainant's original Prehearing Exchange last year. Complainant's Motion is denied with respect to these proposed Exhibits.

Complainant's proposed Exhibit 46 is a copy of Ohio EPA's June 1993 Compliance Evaluation Inspection Procedures Manual, and Complainant's proposed Exhibit 47 is an undated aerial photograph of Zaclon's facility. As there is no explanation as to why these Exhibits are being submitted at this late date, no good cause is found for Complainant's delay in submitting it.

Complainant's proposed Exhibit 48 is an EPA document entitled "Estimating Costs for the Economic Benefit of RCRA Noncompliance" December 1997 Update. This document would only pertain to the penalty assessment for Count 2, as Complainant did not propose to assess an economic benefit component for Count 1. This document should have been submitted sooner, in Complainant's Prehearing Exchange as to Count 2. However, it is important to have documentation as to how EPA calculated the proposed penalty, and prohibiting EPA from submitting this document into evidence may possibly prejudice Respondents, who may also wish to cite to it in defending against the economic benefit calculation.

Complainant's proposed Exhibit 49 is Thomas Roth's inspection notes, which are duplicative of those in Complainant's proposed Exhibit 40, along with other notes from January 11, 1994 and August 2, 1994. Complainant's proposed Exhibit 51 is DuPont's Material Data Safety Sheet for "Quilon," revised March 2003, the relevance of which is not apparent. Complainant's proposed Exhibit 50, 54 and 55 are pages from Respondents' and two of their suppliers' websites, and are publicly available. Complainant's proposed Exhibit 53 consists of pages from websites that reference Respondents or their officers, and reflect information from prior years as to Respondents' business, costs of energy, and real property, that appears to pertain to the issue of Respondents' ability to pay the proposed penalty, which issue is not a factor in mitigating a penalty in this case, as held in the Order dated May 23, 2006. No explanation is given by Complainant as to why these exhibits were not submitted earlier. Good cause has not been shown for including Exhibits 49, 50, 51, 53, 54 and 55 in the Complainant's Final Prehearing Exchange.

Complainant's proposed Exhibit 52 is described by Complainant as a demonstrative Power Point presentation on zinc and iron chemistry from Dr. Douglas Kendall, whose expert testimony Complainant expects to present at the hearing. It includes graphs of solubility and precipitation of zinc and iron. To the extent that it is merely an aid to his testimony, it is not necessary to be admitted into evidence. Therefore, and because it was not presented earlier in this proceeding, it will not be included in the Complainant's Final Prehearing Exchange.

Finally, Complainant's proposed Exhibits 56 and 57 are resumes of Mr. Ewen and Mr. Benson, respectively. As Mr. Ewen will not be testifying, Exhibit 56 will not be included in Complainant's Final Prehearing Exchange. Complainant's Motion has been granted as to Mr.

Benson, and therefore there is good cause to include his resume.

ORDER

1. Respondents' Motion to Supplement Prehearing Exchange to add Robert W. Woods as a witness is **GRANTED**.
2. Complainant's Motion for Leave to File a Final Supplement to the Prehearing Exchange is **GRANTED in part**, as to adding Mr. Barrett Benson as an expert witness, and adding proposed Exhibits 37A, 37B, 38A, 38B, 38C, 39, 40, 40A through 40L, 48, and 57 to the Complainant's Prehearing Exchange.
3. Complainant's Motion for Leave to File a Final Supplement to the Prehearing Exchange is **DENIED in part**, as to adding Mr. Mark Ewen as an expert witness, and as to Complainant's proposed Exhibits 41, 42, 43, 44, 44A, 44B, 45, 46, 47, and 49 through 56.

Susan L. Biro
Chief Administrative Law Judge

Dated: June 2, 2006
Washington, D.C.